

NOTICE  
This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

2011 IL App (4th) 100408-U

Filed 12/7/11

NO. 4-10-0408

IN THE APPELLATE COURT  
OF ILLINOIS  
FOURTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from
Plaintiff-Appellee,	)	Circuit Court of
v.	)	Champaign County
JEREMIAH F. MARTIN,	)	No. 02CF1266
Defendant-Appellant.	)	
	)	Honorable
	)	Thomas J. Difanis,
	)	Judge Presiding.

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JUSTICE APPLETON delivered the judgment of the court.  
Justices Pope and Cook concurred in the judgment.

**ORDER**

- ¶ 1 *Held:* (1) Where defendant was improperly admonished at his plea hearing as to the potential maximum term of imprisonment and, upon the subsequent revocation of his probation, the trial court sentenced him to a term greater than that of which he had been admonished, his sentence is reversed and the cause remanded for resentencing.
- ¶ 2 (2) Where defendant failed to timely apply for postsentencing credit for the time spent in custody in the State of Montana, he is without a remedy.
- ¶ 3 Defendant, Jeremiah F. Martin, appeals from the trial court's order denying his motion for a new sentencing hearing and additional sentencing credit. Defendant pleaded guilty to possession of a weapon by a felon and was sentenced to probation. His probation was revoked and he was resentedenced *in abstentia* to a term of 10 years in prison. He claims that his sentence should be reduced to a term within the range of two to five years, the range the trial court had admonished him he would receive at his plea hearing. He also claims he is entitled to sentencing credit for time

spent in custody in the State of Montana. We reverse defendant's sentence and remand with directions.

¶ 4

#### I. BACKGROUND

¶ 5 In November 2003, defendant pleaded guilty to unlawful possession of a weapon by a felon. At the plea hearing, the trial court admonished defendant he had been charged with a Class 3 felony punishable by a term of imprisonment between two and five years with a mandatory-supervised release term of one year. (This was incorrect, as the statute provides the offense is punishable by a term of imprisonment between 2 and 10 years in prison. See 720 ILCS 5/24-1.1(e) (West 2002).) The State advised the court it was recommending a sentence of 30 months' probation. After considering the factual basis, the court accepted defendant's plea as entered knowingly and voluntarily. The court sentenced defendant in accordance with the State's recommendation.

¶ 6

In April 2006, the State filed a petition to revoke defendant's probation, alleging he had failed to report to his probation officer since December 2005, when he was required to do so twice monthly. The State considered defendant an absconder. A warrant was issued for defendant's arrest but was not served until December 2008.

¶ 7

In January 2009, the trial court conducted a hearing on the State's petition to revoke defendant's probation. Defendant admitted the violation and the court admonished defendant as follows:

"THE COURT: Now, if your probation is revoked, then you would be resentenced for the offense that put you on probation in the first place. And, as you were told, unlawful possession of weapons by a felon is a Class 3 felony. The standard sentence for the UUW by

a felon is not less than two and I believe it's extended out to a ten-year maximum, followed by a period of mandatory supervised release of one year. The maximum fine could be up to \$25,000.

Do you understand those would be the maximum penalties for that offense?

THE DEFENDANT: Yes, sir."

¶ 8 Defendant was released from custody while awaiting resentencing. According to defendant's presentence-investigation (PSI) report, he had been convicted of the following felony offenses: (1) as a juvenile, a 1993 burglary for which he was sentenced to probation, with that probation being subsequently revoked and resentenced to probation; (2) a 1994 burglary for which he was sentenced to probation, with that probation being subsequently revoked and resentenced to four years in prison; (3) a 1997 burglary for which he was sentenced to four years in prison; (4) a 2003 obstructing justice for which he was sentenced to probation, with that probation being subsequently revoked, and for which resentencing was pending; and (5) a 2008 theft in the State of Montana.

¶ 9 On March 4, 2009, at the resentencing hearing, the trial court sentenced defendant *in absentia*. Apparently, defendant was in custody in Montana. The State presented evidence in aggravation regarding defendant's most recent arrest in Illinois in December 2008 for obstructing justice. The officer had responded to a complaint that defendant had committed a battery. When the officer attempted to take defendant into custody, he resisted and the officer was forced to utilize his taser gun to gain control of defendant. After considering the evidence, the statutory factors in aggravation and mitigation, the PSI, and arguments of counsel, the court resentenced defendant to

10 years in prison, due primarily to defendant's "extensive" criminal history and his failure to comply with prior community-based sentences.

¶ 10 On April 20, 2009, more than 30 days after the resentencing hearing, defendant filed a handwritten letter to the trial court asking that his imposed 10-year term be ordered to run concurrently to a 5-year term that was to be imposed in Montana 10 days later. On May 5, 2009, the court denied defendant's request. Nevertheless, defendant requested the same relief in at least six more *pro se* filings. The court continued to deny defendant's requests. On August 5, 2009, defendant wrote a letter requesting an appeal. No further action was taken.

¶ 11 On May 12, 2010, defendant, through counsel, filed a motion for a new sentencing hearing pursuant to section 115-4.1(e) of the Code of Criminal Procedure of 1963 (Code of Criminal Procedure) (725 ILCS 5/115-4.1(e) (West 2008)), claiming his absence was beyond his control as he had been in custody in Montana. He requested the opportunity to present evidence in mitigation. He also filed a motion to obtain "additional jail credit" for time spent in custody in Montana. The trial court denied defendant's motions, finding he had not been forced to go to Montana and did so on his own free will. The court implied that defendant, in fact, must have traveled in violation of the conditions of his bond. The court also denied defendant's request for sentencing credit. He filed his notice of appeal on June 1, 2010. This appeal followed.

¶ 12 II. ANALYSIS

¶ 13 Before considering an appeal, we have a duty to insure that jurisdiction is proper. *People v. Smith*, 2011 Ill. App. (4th) 100430 ¶ 11. Section 5-8-1(c) of the Unified Code of Corrections requires that a postsentencing motion be filed within 30 days of the imposition of the sentence (730 ILCS 5/5-8-1(c) (West 2008)). Defendant was sentenced on March 4, 2009, making

his postsentencing motion due within 30 days. Defendant did not file a motion contesting his sentence within that time period. However, the tardy filing does not deprive us of appellate jurisdiction because section 115-4.1 of the Code of Criminal Procedure allows the trial court to retain subject-matter jurisdiction when either the trial or sentencing was conducted *in absentia*. See 725 ILCS 5/115-4.1 (West 2008). Thus, we find we have jurisdiction to consider the merits of this appeal. *People v. Williams*, 274 Ill. App. 3d 793, 796 (1995) (this court addressed the issue of an otherwise untimely postsentencing motion in light of the procedures provided in section 115-4.1 and determined this court had appellate jurisdiction).

¶ 14 Defendant first contends his 10-year sentence should be reduced due to the trial court's failure to admonish him at the plea hearing that the maximum sentence he could receive would be 10 years in prison, not 5. The State concedes defendant was incorrectly admonished, but claims defendant should raise the error in a postconviction petition. The trial court's imposition of a 10-year sentence was not based upon the extended-term provisions of section 5-8-2 of the Unified Code of Corrections (730 ILCS 5/5-8-2(b) (West 2008)) as defendant seems to argue in his brief. Rather, a 10-year sentence was the maximum term available for the offense for which defendant had pleaded guilty. Indeed, the statute provides that the Class 3 felony of possession of a weapon by a felon is punishable by a prison term of 2 to 10 years. See 720 ILCS 5/24-1.1(e) (West 2002). The court mistakenly admonished defendant that he could receive a maximum term of only five years in prison. Defendant insists his 10-year sentence is void because the court was not authorized to impose a sentence greater than the 5-year sentence it warned defendant he could receive.

¶ 15 This court's decision in *People v. Gregory*, 379 Ill. App. 3d 414 (2008), is instructive on the effect of a trial court's improper admonishments. In *Gregory*, as here, the trial court

incorrectly admonished the defendant as to the potential maximum term (14 years as an extended term, 7 years nonextended term) he could receive at resentencing should his probation be revoked. *Gregory*, 379 Ill. App. 3d at 415. At resentencing, the court realized the defendant should have been sentenced as a Class X offender and that probation was not available. The court resented defendant to a term of 15 years in prison. *Id.*

¶ 16 The defendant appealed, claiming his 15-year sentence should be reduced to 7 years, as the maximum nonextended term of which he was admonished. This court noted that the appropriate remedy for this situation was a matter of first impression. *Id.* "When no direct appeal is taken from an order of probation and the time for appeal has expired, a reviewing court is precluded from reviewing the propriety of that order in an appeal from a subsequent revocation of that probation, unless the underlying judgment of conviction is void." *Id.* (quoting *People v. Johnson*, 327 Ill. App. 3d 252, 256 (2002)). We note improper admonishments themselves do not render the defendant's conviction and sentence void. *Id.*

¶ 17 This is where the *Gregory* case and this case part ways. The sentence of probation imposed upon the defendant's guilty plea in *Gregory* was void, as the offense was not a probationable offense. Here, we do not have a void judgment.

"When only an improper sentencing admonishment is at issue, withdrawal of the guilty plea is not an available remedy since improper admonishments do not themselves render a defendant's conviction void (*Jones*, 213 Ill. 2d at 509 []) and a reviewing court can only review the propriety of the underlying judgment in an appeal from a probation revocation if it is void (*Johnson*[], 327 Ill. App. 3d

at 256 []). See *People v. Taylor*, 368 Ill. App. 3d 703, 707-08 [] (2006) (addressing an unadmonished extended-term sentence after a probation revocation). Thus, when just the admonishment was improper, the only available remedy to address the error is a sentence in accordance with the improper admonishment." *Gregory*, 379 Ill. App. 3d 421-22.

Accordingly, we find the appropriate remedy under these circumstances, where the trial court mistakenly admonished defendant that he would be subject to a maximum term of 5 years in prison when actually defendant could have been subject to a maximum term of 10 years in prison, based on the statutory provisions of the offense of unlawful possession of a weapon by a felon, is to reverse and remand this case to the trial court for resentencing in accordance with the admonishments defendant received at the plea hearing. See *People v. Taylor*, 368 Ill. App. 3d 703, 708 (2006) (on a revocation of probation when the defendant was sentenced to an extended term without being admonished that an extended term was available at the time he pleaded guilty, "the proper remedy is to vacate the extended-term sentence so that the defendant may be sentenced in accordance with the admonishments that he received before he pleaded guilty"). Accordingly, we reverse defendant's 10-year sentence and remand for resentencing in accordance with the admonishment he received.

¶ 18 Defendant also claims he is entitled to sentencing credit for time spent in custody in the State of Montana. Defendant was sentenced in this case on March 4, 2009. Defendant was arrested in Montana on April 13, 2009. Defendant claims he is entitled to credit for the time he spent in custody in Montana from April 13, 2009, to May 26, 2010, the day before he began serving his Illinois sentence. He was sentenced to 60 months in prison in Montana on April 30, 2009, and

thereafter served the sentence before returning to Illinois in May 2010. Defendant is seeking postsentencing credit for the time he spent in Montana custody after he had been sentenced in Illinois. Each of the cases cited by defendant refer to presentencing custody and do not apply to the situation before us.

¶ 19            Though defendant disagrees, section 5-8-1(f) of the Unified Code of Corrections (730 ILCS 5/5-8-1(f) (West 2008) now 730 ILCS 5/5-4.5-50(f) (West 2010) (eff. July 1, 2009)) would apply to allow defendant potential relief. Section 5-8-1(f) provides as follows:

"A defendant who has a previous and unexpired sentence of imprisonment imposed by an Illinois circuit court for a crime in this State and who is subsequently sentenced to a term of imprisonment by another state or by any district court of the United States and who has served a term of imprisonment imposed by the other state or district court of the United States, and must return to serve the unexpired prior sentence imposed by the Illinois Circuit Court may apply to the court which imposed sentence to have his sentence reduced.

The circuit court may order that any time served on the sentence imposed by the other state or district court of the United States be credited on his Illinois sentence. Such application for reduction of a sentence under this subsection (f) shall be made within 30 days after the defendant has completed the sentence imposed by the other state or district court of the United States."

However, in order to be awarded relief, defendant was required to apply for relief within 30 days of completing his foreign sentence. Defendant failed to do so and is therefore without a remedy.

¶ 20

### III. CONCLUSION

¶ 21 For the foregoing reasons, we reverse defendant's sentence and remand with directions for resentencing.

¶ 22 Reversed and remanded with directions.